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In the Supreme Court of the United States

October Term, 1969

No. [redacted] 87 88

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Amicus Curiae Brief for the State of Utah

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Amicus Curiae Brief for the State of Utah

STATEMENT OF INTEREST

Utah, as most other Western states, has a comprehensive system for water administration, which includes procedures for the appropriation, adjudication and distribution of water, Chapters 1 through 5, inclu-

sive, Title 73, Utah Code Annotated, 1953, Replacement Volume 7B. This system is vital to the orderly utilization of the water in this state, and proceedings for the general adjudication of water rights forms an important element of this program. Under present procedures the only way a complete record of all rights can be realized is through a general adjudication proceedings. The decrees that result from these proceedings provide an integrated record of the water users' rights, serve as a basis for achieving proper distribution among existing users from a water source, and also provide a basis to determine whether water is available to be appropriated for new uses. There are a number of such actions presently in process in various areas of the state. Because the United States has many uses of water within the state, including uses on Forest lands, the inclusion of all of the rights of the United States in these general adjudication proceedings is a matter of fundamental importance to the State of Utah. Consequently, the State of Utah is vitally interested in preserving a water right adjudication procedure that will allow for the complete adjudication of all rights claimed by a water user.

Whether or not Water District 37 constitutes a "river system" as defined by 43 U.S.C. 666 is beyond the scope of this brief.

Further, it is submitted that the determination of the existence, non-existence or the extent of "reserved rights" is not properly before this Court at this time. Determination of that issue should only come after the jurisdictional question has been answered and the Colorado Court has been allowed to adjudicate the

Eagle River System upon the facts submitted in that action. Then, and only then, is the proper time for this Court to review the validity of the Colorado Court's decision concerning the Reservation Rights.

ARGUMENT

THE McCARRAN AMENDMENT, 45 U.S.C. 666, ALLOWS FOR THE JOINDER OF THE UNITED STATES OF AMERICA IN A PROPER GENERAL ADJUDICATION PROCEEDINGS TO DETERMINE ALL OF THE WATER RIGHTS CLAIMED BY THE UNITED STATES.

With increasing development and added demands for water in the West, there developed a corresponding need to define and settle the individual water rights among the users of a common water supply. The lack of a complete record and evaluation of all rights from a water source made effective water right administration difficult or impossible, and also caused title uncertainty between individual users. This was so because absent such a record the integration of the individual rights which is necessary to insure the proper distribution of water between users was not possible, and also without knowing the extent of existing rights the amount of water that was available for appropriation to new uses was unknown. Further, because of the close interrelationship of the rights, it was necessary that all of the rights be evaluated in order that the various users could know the extent of their rights to a common water supply. Historically, private lawsuits

between various individuals had simply failed to accomplish an effective adjudication of rights from a water source because such actions did not encompass all uses. This resulted in a multiplicity of individual lawsuits to solve continuing water right problems but the net effect was still title uncertainty between the users in many cases, *Pacific Live Stock Co. v. Oregon Water Board,* 241 U.S. 440, 447-449 (1915); also see Hutchins, *Selected Problems in the Law of Water Rights in the West,* U.S. Dept. of Agriculture, Misc. Pub. No. 418, pp. 74-78 (1942).

Therefore it was apparent that there existed a need for a comprehensive adjudication procedure that would provide the means to fully evaluate and integrate all facets of the numerous rights from a given water source. The "general adjudication" or "general determination" proceeding, as it is commonly known in the West, developed to fill this need. Under the laws of the Western states, procedures now exist whereby water users or state officials can initiate judicial proceedings to obtain a determination of the respective water rights of water users on a particular river or other water system. Due to the priority concept of the appropriation doctrine, if any such general adjudication of water rights is to be effective, it is imperative that all water users from a single source of supply be joined in the action and bound by the results. Further, it is equally imperative that all of the users who are joined be required to submit all of their claims for adjudication.

Unfortunately, prior to the enactment of the McCarran Amendment, 43 U.S.C. 666, the objectives of a general adjudication proceedings could not be accom-

plished where uses of the United States were involved. The United States, because of sovereign immunity, could not be joined in such adjudications. Since the United States claims the right to initiate unknown and undetermined future uses, other water users had no assurance or security that their current water supply would remain intact. This left the predicability of future water supplies in an unstable and intolerable confused state among water users and prevented effective water right administration.

The McCarran Amendment, 43 U.S.C. 666, was specifically enacted to remedy this situation and to allow the objectives of a general adjudication proceeding to be accomplished. This section provides in part:

> "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States when a party to any such suit shall (1) be deemed to waive any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit."

To now adopt the position advocated by the United States that under this statute it is only required to submit a part of its rights for determination would be to return to the very administrative frustration and title uncertainty that the general adjudication procedure was specifically designed to avoid. Certainly no one familiar with such actions ever suspected that a claimant could be required to appear but could only be required to assert a portion of his rights to a particular water source. Such a result would destroy the value of this type of proceeding just as effectively as not having a party before the court. What is sought in such an action is an adjudication of all of the rights of the parties to the action, not merely part of the rights of all of the parties.

The legislative history of the McCarran Amendment clearly indicates that it was enacted because of this problem and to allow an effective determination of *all water rights*. This is perhaps best illustrated by the resport of the Senate Judiciary Committee which states:

> "In the administration of and the adjudication of water rights under state laws, the state courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, *and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights.* Accordingly *all* water users on the stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a state court, such claims could materially interfere with

the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the state courts." (Emphasis added) Senate Report No. 775, 82d Cong., 1st Sess. (1951).

It is clear that this Committee was cognizant of the nature, scope and objectives of a general adjudication proceedings since it specifically referred to the case of *Pacific Live Stock Co. v. Oregon Water Board,* supra, wherein the constitutionality of the Oregon statutory general adjudication procedure was upheld. This Committee in discussing the result on state procedure if the government was to maintain its position of immunity stated:

> "If such a condition is to continue in the future it will result in a throw-back to the conditions that brought about the enactment of the statutory water laws, i.e., the necessity that the public waters so necessary to the economic welfare of the arid States be allotted in as equitable manner as possible to all users of the available supply thereof. It is said of such laws by the Supreme Court in the case of *Pacific Livestock Co. v. Oregon Water Board* (241 U.S. 447):
>
> > 'All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a comple ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the

> testimony of witnesses with its recognized infirmities and uncertainties; and third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.' "

The absolute necessity of joining the United States to achieve effective adjudication of water rights was reiterated later in the report:

> "Since it is clear that the states have the control of the water in their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the state, if there is to be a proper administration of the water law as it has developed over the years.
>
> • • •
>
> "The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decision of the court in the same manner as if it were a private individual."

Subsequent to the enactment of this legislation this court in *Dugan v. Rank*, 372 U.S. 609, 618-619 (1963) in concluding that a particular action which had arisen in California was not within the purview of the McCarran Amendment because it was a private action and not a general adjudication, briefly discussed the scope of the McCarran Amendment in the following terms:

> "It is sufficient to say that the provision of the McCarran amendment, 66 Stat 560, 43 U.S.C. § 666, relied upon by respondents and providing that the United States may be joined in suits 'for the adjudication of rights to the use of water

> of a river system or other source,' is not applicable here. Rather than a case involving a *general* adjudication of 'all of the rights of various owners on a given stream,' S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), it is a private suit to determine water rights solely between the respondents and the United States and the local Reclamation Bureau officials. In addition to the fact that all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established as to the appropriative and prescriptive rights asserted."

In summary, it seems indisputable that the purpose of the McCarran Amendment was to make possible an effective determination of all water rights from a single source of supply. Under any other interpretation, the probability remains that any decree determining priorities and extent of rights will be ineffective and may later be overturned. The instability in water rights adjudication was the very evil the measure was designed to eliminate. The position of the United States that it may withhold part of its rights from determination must come as a surprise to everyone who thought they understood the scope and meaning of a "general adjudication" action. It is of little value to make someone a party to such litigation if the court cannot adjudicate all of his rights.

The United States urges this Court to construe the McCarran Amendment to preclude proper adjudication of all water rights. It argues that the prepositional phrases referring to modes of acquisition—that is, (a) "by appropriation under state law," (b) "by purchase," (c) "by exchange," and (d) "or otherwise,"

—modify and qualify the phrase "the owner of." So construed, federal ownership alone is not sufficient ground to justify joinder of the United States in a water adjudication suit. Rather, on this view, the United States may be joined only if it acquired the pertinent water rights by one of the specified modes of acquisition. They claim that reserved water rights have not been acquired by means of "appropriation," "purchase" or "exchange," which are modes of acquisition under state law, and that the rule of *ejusdem generis* limits the denotation of "or otherwise" only to other means of acquisition under state law. Inasmuch as reserved water rights are not acquired pursuant to state laws, the government argues, the Act does not authorize joinder of the United States in water rights adjudications concerning reserved rights. Whatever technical merits this interpretation may have, it is clearly erroneous. Such an interpretation frustrates the stated purpose of the McCarran Amendment, perpetuating the very evil it was designed to correct.

The statutory language is susceptible of a different, more reasonable interpretation which implements the purposes of the Act. The phrase "the owner of" should be accorded general application and *not* be qualified by the phrases referring to the specified modes of acquisition.

Thus construed, the statute would be read as follows:

> Consent is given to join the United States as a defendant in any suit where it appears that the United States [1] is the owner of [water rights] or [2] is in the process of acquiring water

rights by [a] appropriations under state law, [b] by purchase, [c] by exchange, or [d] or otherwise.

This interpretation is supported by the doctrine of the "last antecedent" which holds that relative and qualifying words, phrases, and clauses are to be applied to the words or phrases *immediately* preceding, and are not to be construed as extending to or including others more remote, *United States v. Hughes*, 116 F.2d 613 (1940) and *City of Santa Barbara v. Maher*, 77 P.2d 306 (1938). Under this rule, phrases [a], [b], [c], and [d] are applied only to the immediately preceding phrase, "is in the process of acquiring water rights" and *not* to the more remote phrase "the owner of." This interpretation would allow joinder of the United States in water rights adjudication on the basis of ownership alone regardless of the source of that ownership.

The same result can be achieved by rejecting the government's application of the rule of *ejusdem generis* to the phrase "or otherwise." The government's argument that this phrase must be limited to modes of water rights acquisition under state law is not well founded in that "purchase" and "exchange" are not peculiarly modes of acquisition under state law as is appropriation. In fact, the United States has asserted the claim that "when the United States acquired ownership of the public domain by cession from foreign sovereigns, it acquired the rights to use waters thereon within the bundle of rights which ownership of the lands involves," Katzenbach, Deputy Attorney General, in Hearings before the Subcommittee on Irrigation and Reclamation of the Interior and Insular Affairs, U. S. Senate,

on S. 1275, p. 11 (1964). This claim is also asserted by the United States in its brief in this case, p. 20-21.[1] Certain of those "cessions" upon which the reserved rights are claimed were "purchases." If the United States were to "exchange" public lands for lands on an Indian reservation, it would undoubtedly assert that there was not a relinquishment of whatever water rights those Indian lands might have. In neither example are the rights being claimed acquired "by appropriation under state law."

To accept the interpretation of the United States would render the phrases "by purchase" and "by exchange" meaningless, inasmuch as, according to the United States, these terms are included in "by appropriation under state law." Such a construction would violate the presumption that the legislature intends that each word in a statute should have some meaning all its own, and is included in the statute for a particular purpose. Thus, it seems more reasonable that [a], [b], and [c] be construed as members of the general class of modes of water rights acquisition and [d] "or otherwise" serving to complete or exhaust that class. So construed, the Act would extend to adjudication of all types of federal water rights.

It seems apparent that the language in question is amenable to more than one interpretation and hence must be given that which will best effect its purpose rather than one which would defeat it, *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934).

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1 It should be noted at this point that the State of Utah does not acknowledge the validity of this argument of the United States.

Concerning the use of the various rules of statutory construction this court has stated:

> "However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Securities and Exchange Commission v. Joiner Leasing Corp.*, 320 U.S. 344, 350-351 (1943).

As this Court has often held in construing a statute, to give effect to the intent or purpose of the legislature, the Court must look to the object to be accomplished and the evil or mischief sought to be remedied, *United States v. Byron*, 339 U.S. 323, 338 (1950), rehearing denied 339 U.S. 991 (1950). In ascertaining the legislative intent and purpose, it is necessary and proper to look to the purpose to be subserved by the statute, and, if possible, construe the statute so that it will accomplish that purpose. In *Helvering v. N. Y. Trust Co.*, 292 U.S. 455, 464-465 (1934), it was observed in this regard:

> "The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. *Commission of Immigration v. Gottlieb*, 265 U.S. 310, 313. *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 37. But the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would

> often defeat the object intended to be accomplished. Speaking through Chief Justice Taney in *Brown v. Duchesne*, 19 How. 183, this court said (p. 194): 'It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take a connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.' Quite recently in *Ozawa v. United States*, 260 U.S. 178, we said (p. 194): 'It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.' And in *Barrett v. Van Pelt*, 268 U.S. 85, 90, we applied the rule laid down in *People v. Utica Ins. Co.*, 15 Johns. 358, 381, that 'a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute, is not within the statute, unless it is within the intention of the makers.' "

The McCarran Amendment was enacted to allow a comprehensive determination of water rights which would eliminate uncertainty and confusion between water users and allow for efficient water right administration. To allow the United States to withhold a

portion of its claimed water rights from such proceedings would certainly destroy the effectiveness of such an action and would defeat the very purpose of this legislation. While it is clear that there is no right to sue the United States without its consent, it must be equally clear that where consent has been given, the terms of the consent must not be interpreted in such a way that the very purpose sought to be achieved by granting consent is defeated.

The anomalous consequence of the government's construction of the Act focuses attention on a fundamental inconsistency in the government's position. On the one hand, the government resists the jurisdiction of the Colorado district court on the grounds that the action is not a general adjudication of all purported water rights on an entire river system. The United States, it urges, may not be subjected to piecemeal litigation in the resolution of its water rights. But in the next breath, the government argues that the McCarran Amendment should be construed to allow determination of only federal appropriative rights and no federal reserved rights, thus precluding the possibility of a complete general adjudication.

CONCLUSION

For the foregoing reasons 43 U.S.C. 666 should be interpreted as requiring the United States of America to submit all of its claims in a general adjudication

proceeding and the decision of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vernon B. Romney, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing brief of the State of Utah were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; the Attorney General of the State of Colorado, State Capitol Building, Denver, Colorado 80203; Delaney & Balcomb, P. O. Drawer 790, Glenwood Springs, Colorado 81601, attorneys for the District Court in and for Eagle County, State of Colorado and the Judge thereof; Miller & Ruyle, 1004 A 9th Ave., Greeley, Colorado 80631, attorneys for Central Colorado Water Conservancy District; George L. Zoellner, 144 West Colfax Ave., Denver, Colorado 80202, attorney for City and County of Denver, acting by and through its Board of Water Commissioners; and Raphael J. Moses, P. O. Box 34, Boulder, Colorado 80302, attorney for New Jersey Zinc Company; by mailing the same, airmail postage prepaid to their respective offices, this 11th day of July, 1970 all in accordance with the rules of this Court.

VERNON B. ROMNEY
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State of Utah